

DATE: APRIL 27, 1995

Case No. 89-STA-7

In the Matter of:

THOMAS E. MOYER
Complainant,

v.

YELLOW FREIGHT SYSTEM, INC.
Respondent.

APPEARANCES:

Richard G. Ross, Esq.
For the Complainant

Jeffrey L. Madoff, Esq.
For the Respondent

Before: GEORGE P. MORIN
Administrative Law Judge

**SECOND RECOMMENDED SUPPLEMENTAL
DECISION AND ORDER ON REMAND**

This case arises under Section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. §§2305 et seq., hereinafter, "the Act." The Act affords protection to covered employees from discrimination or discharge for engaging in certain protected activities.

This proceeding was initiated when a complaint was filed with the Secretary of Labor on November 14, 1988, by Complainant, Thomas E. Moyer, alleging that Respondent, Yellow Freight Systems, Inc., had illegally discriminated against him in violation of §405(b) of the Act. Specifically, Complainant asserted that Respondent discharged him in reprisal for his refusing to operate a commercial vehicle due to illness.

On May 18, 1989, a formal administrative hearing was held before District Chief Administrative Law Judge E. Earl Thomas in Tampa, Florida. That hearing focused on Complainant's actions pursuant to §405(b). However, testimony also surfaced regarding Complainant's involvement in the grievance proceeding of a co-worker, Robert E. Lee. According to his Recommended Decision and Order issued August 1, 1989, Judge Thomas found no §405(b) violation, as Complainant failed to establish his engagement in "protected activity." With regard to Complainant's involvement in Lee's grievance proceeding, Judge Thomas found that no violation of §405(a) had either been alleged or proven.

In a Final Decision and Order of Remand issued November 21, 1989, the Secretary of Labor sustained Judge Thomas' finding with regard to §405(b) but reversed his determination that there had been no violation of §405(a). The Secretary found sufficient evidence to warrant a finding of an illegal discharge in violation of §405(a). Accordingly, she ordered Respondent to reinstate Complainant immediately and remanded the case to Judge Thomas for determination of additional appropriate relief.

On December 22, 1989, Respondent appealed the Secretary's Order to the United States Court of Appeals for the Sixth Circuit. While that appeal was pending before the Sixth Circuit, Judge Thomas issued a Recommended Supplemental Decision and Order on Damages, dated June 18, 1990, awarding Complainant the following additional damages: \$42,710.04 in back pay; \$3,502.54 in interest; \$6,584.02 for medical expenses; \$1,095.36 for litigation costs; \$15.64 for costs of seeking alternative employment; and the right to have contributions made on his behalf to the appropriate health, welfare and pension funds for the period since his discharge.

On September 27, 1990, the Secretary adopted Judge Thomas' Recommended Order on Damages in its entirety with the exception of the finding as to medical expenses. The Secretary agreed with Respondent that ordering Respondent to reimburse Complainant for his medical expenses, as well as to pay health and welfare fund premiums for the period in which he incurred his medical expenses, was duplicative. Accordingly, the Secretary only required Respondent to reimburse Complainant for medical expenses incurred and to pay sufficient monies into Complainant's health and welfare fund to insure immediate coverage upon reinstatement. In addition, the Secretary slightly modified Judge Thomas' Order to allow continuing accrual of back pay with interest until the date of reinstatement and to extend Respondent's liability for additionally incurred attorney's fees.

Subsequent to the issuance of the Secretary's Final Order on November 21, 1989, the Sixth Circuit found that Respondent had not been given prior notice by either Complainant or the Secretary of a §405(a) violation. The Sixth Circuit held that Respondent had not been given the opportunity to respond or defend the alleged §405(a) violation as guaranteed under due process. Accordingly, the case was remanded to the Department of Labor to provide a hearing regarding the §405(a) violation.

On January 26, 1993, Judge Thomas conducted a supplemental hearing devoted to the disputed §405(a) violation. In a Recommended Decision and Order on Remand issued May 24, 1993, Judge Thomas Found no §405(a) violation and recommended that the complaint be dismissed.

On October 21, 1993, Secretary of Labor Robert Reich issued a Decision and Order on Remand, reversing Judge Thomas' finding of no §405(a) violation and ordering immediate reinstatement. Additionally Secretary Reich remanded the case to Judge Thomas for determination of additional appropriate relief.

Due to his impending retirement, Judge Thomas was unavailable to conduct a hearing on additional appropriate relief. Accordingly, the case was reassigned to the undersigned and a hearing was held on October 3 through October 5, 1994, in Cleveland, Ohio. Complainant's exhibits 1 through 6, Respondent's exhibits 1 through 126, and Joint exhibits 1 through 6 were introduced and received in evidence.¹

THE PARTIES' BASIC CONTENTIONS ON ADDITIONAL DAMAGES

Complainant's Position

Despite the court's repeated attempts to secure a brief from Complainant,² the court did not receive a brief from either Complainant or his counsel regarding Complainant's assessment of damages Complainant expected to be awarded in this case. However, Complainant contended at the hearing, that he is entitled to reinstatement with full benefits, full back pay, full payment for vacation, sick pay, holidays, birthdays, reimbursement for all medical expenses, and the costs of attorney fees and other litigation related expenses. (TR 5-10) Complainant acknowledged that he had received earnings through interim employment, in the total amount of \$21,509.16 since March 1990. With respect to the appropriate amount of back pay, Complainant has stipulated to the comparative earnings of three individuals with similar job titles and seniority dates as those of Complainant. (TR 7)

Respondent's Position

Respondent's starting premise is that despite his obligation to mitigate damages, Complainant made only minimal efforts to obtain meaningful employment in the occupation for which he was fully qualified, by training and experience, that of an over-the-

¹ The following abbreviations have been used throughout this Decision and Order: R-COMP - Complainant's exhibit; R-RESP - Respondent's exhibits; JX - Joint exhibit, and TR - Transcript of the hearing.

² At the end of the hearing, the court specifically provided for the parties to file simultaneous briefs. (TR 496) Counsel for the Complainant gave no indication at that time of any inability or unwillingness to comply with the court's request for briefs.

road (OTR) tractor-trailer driver. During the time Complainant would have been looking for a position paying comparable salary and fringe benefits, the industry was experiencing a severe shortage of OTR drivers.³ Respondent additionally contends that Complainant either took jobs with low-paying companies employing temporary drivers and offering no benefits, or else left the one or two jobs comparable to the one he had with Yellow either for an inadequate reason or for no reason at all. Respondent's ultimate conclusion with regard to additional damages is that because of Complainant's utter failure to mitigate damages, it is not liable for any additional damages. However, Respondent submits, in the event the court finds any liability for payment of additional damages, Respondent has proposed three alternative methods for computing damages accrued between the date of the last damages hearing in 1990 and the present.

In the first alternative, Respondent has computed gross back pay from August 5, 1990 to January 30, 1992, to be \$76,349.00. After applying an offset of \$53,059.00 for money earned in alternative employment and money Respondent claims Complainant should have earned from other employers if he had not unjustifiably quit their employ, Respondent arrives at the back pay amount of \$23,290.00. Under this method of calculating, Respondent allows for no back pay reimbursement for the period January 30, 1992 to the present because on January 30, 1992, Complainant, believing himself totally disabled, applied for Social Security disability benefits. The gross back pay figure (\$76,349.00) is based on stipulated average monthly comparable earnings of employees with comparable seniority, as detailed in revised JX-1. Offsets from the gross back pay figure from the period August 5, 1990 to January 30, 1992, include \$8,930.00, which Complainant earned between August 5, 1990 and December 31, 1990 while working for Transportation Unlimited (a leasing company); \$1,577.00 earned in a two-week period falling between the dates of January 1, 1991 and March 30, 1991, while employed by Superior Fleet; \$3,513.00 and \$2,922.00 earned between January 1, 1991 and April 30, 1991 while employed by Transportation Unlimited and P&M Trucking, respectively; and \$36,117.00 for the remaining time between January 15, 1991 and January 30, 1992, when not actually working for either P&M or

³ In order to document this truck driver shortage, Respondent introduced voluminous documentary evidence, mostly in the form of classified advertisements appearing in newspapers to which Complainant would have had access, and industry and government statistics supporting the existence of the driver shortage. In light of the fact that there was no oral evidence elicited, either on direct or cross examination regarding this material nor was the truth of the matter asserted in the documentary evidence questioned, the court sees no need for extensive analysis of this portion of Respondent's case.

Transportation Unlimited, at the Superior Fleet rate of \$788.00 per week.⁴

The second alternative assumes Complainant was employed and/or employable for a portion of 1992 beyond January 30th. Again, using comparable earnings from February 23, 1992 to June 25, 1992,⁵ Complainant could have earned \$13,132.00 for that period in his regular job with Yellow Freight. This amount is offset by the Superior Fleet rate for 18 weeks (18 x \$788.00 = \$14,184.00). Respondent does not believe it is responsible for any payments whatsoever for the period January 30 to February 22, 1992, while Complainant was recuperating from a January 30, 1992 surgical procedure performed to alleviate his hidradenitis condition. Thus, the first alternative back pay final figure of \$23,290.00 is increased by the difference between Complainant's baseline back pay rate and the Superior Fleet rate of \$14,184.00, or \$3,948.00.

Alternative three assumes payment of Complainant's baseline Yellow Freight wage rate from August 5, 1990 until September 19, 1992, the date of the letter announcing SSA's determination of Complainant's entitlement to benefits, which the parties

⁴ Respondent's method of computing this offset is contained in footnote 16 to Respondent's Proposed Findings of Fact and Conclusions of law as to Additional Appropriate Relief and is set forth here in its entirety:

16/ Complainant quit higher paying employment at Superior Fleet after two weeks employment in January 1991 @ \$788/week (\$1,577 ÷ 2) to work for PAM, lower paying employment (\$3,513 ÷ 7 weeks = \$502/week) and for Transportation Unlimited, lower paying employment (\$400/week). Complainant is, therefore, charged with 54 weeks at the Superior Fleet rate of \$788/week (\$42,552), less his PAM and Transportation Unlimited Earnings.

⁵ June 25, 1992 was the date Complainant was seen by Dr. June M. Rees for an interview and psychiatric evaluation in connection with his SSA disability claim. Dr. Rees' seven-page report is in evidence as R-RESP 113. A prior physical examination, done for the same purpose, has been performed ten days earlier, on June 15, 1992, by Dr. Ratan K. Mukherjee. (R-RESP 115) In a letter from Gwendolyn S. King, Commissioner of Social Security, to Diane Y. Van Niel, a friend of Complainant and his designated "Representative Payee", dated September 19, 1992, it is indicated that SSA determined that June 25, 1992 was the onset date of Complainant's disability, thus the significance of this date in Respondent's second alternative method of computing additional damages.

stipulated (using earnings of the three comparable employees) to be \$117,052.00. From this amount, Respondent subtracted total offsets to arrive at a net back pay of \$26,169.00.

With regard to medical expenses, Respondent argues that Complainant unjustifiably left interim employment just prior to qualifying for medical coverage. If the court awards medical reimbursement, Respondent asserts that said reimbursement should not cover the two surgeries for hidradenitis, which were covered and paid for by welfare, or for any expenses arising after December 1993, as Complainant's expenses were thereafter covered by Respondent's medical plan.

As for Complainant's request for attorney's fees, Respondent maintains that Complainant's claim is excessive and should be reduced to cover only reasonable attorney's fees. Specifically, Respondent maintains that it is not responsible for the attorney's fee of Lincoln R. Thorman, Esq., as this fee covers the same time period as fees claimed by Chattman, Sutula, et al. (Respondent's Brief, pp. 80-82)

FINDINGS OF FACT

Prior to his employment with Respondent, Complainant worked in the trucking industry for almost ten years. Complainant began his period of employment with Respondent as an OTR driver beginning on September 9, 1978 and remained so employed until his illegal discharge on November 9, 1988.⁶ On the date of his discharge, Complainant was covered by a collective bargaining agreement and a health, welfare, and union pension fund which determined complainant's medical, vacation, and other benefits. Motor carriers whose employees are represented by the Teamsters Union are signatories to the National Master Freight Agreement (NMFA, hereinafter), in which pay rates, benefits and conditions of employment are set out.

After his discharge by Respondent, Complainant worked for a number of other trucking companies, both in Florida and Ohio. Explaining that he could not successfully secure a trucking job in Ohio due to his termination by Yellow Freight, Complainant relocated in December 1988 to Clearwater, Florida. Shortly after his relocation, Complainant began his job search by applying for a chauffeur's license and interviewing with various Florida trucking firms.

⁶ Except for the short period from February 22, 1988 to March 22, 1988, when Complainant worked as a city driver, Complainant was employed as an OTR driver for the entire period of his employment with Respondent.

In March 1989, Complainant worked as a driving instructor for the Jorgenson Truck Driving School, earning \$9.00 an hour. Complainant worked for Jorgenson for nine days until his employment was terminated by mutual agreement. While in Jorgenson's employ, Complainant earned a total of \$720.00. (RX 43)

In May 1989, Complainant worked as a lease driver for Universal Select, Inc., in Tampa, Florida. Complainant worked for Universal for approximately two weeks and earned a total of \$942.00. (RX 45) At the March 1990 hearing, Complainant testified that he left Universal in order to return to Ohio in anticipation of his reinstatement with Respondent pending the court's decision.

A month after returning to Cleveland, in June or July 1989 (TR 62), Complainant secured employment as a lease driver with Transportation Unlimited where he worked sporadically during the next couple of months. He earned a total of \$1,512.05. (RX 46) Complainant left Transportation Unlimited to pursue more steady work with Continental Baking Company, but only worked there from July 16 through August 5, 1989. He was paid at an hourly rate of \$9.00, and earned a total of \$904.04. (RX 45) His employment with Continental Baking ended when he was discharged, according to Complainant, because of his inability to jack-knife a 45-foot trailer, at an angle, into a loading dock.⁷ At the 1990 damages hearing, Complainant had testified that his discharge resulted from a lack of reliable transportation, medication to control his serious physical condition (hidradenitis), and funds to buy needed eyeglasses.⁸

⁷ At his deposition taken January 28, 1994, Complainant intimated that the real reason he was discharged by Continental Baking was because ". . . they found out that I was trying to get my job back at Yellow." (R-RESP-3, p. 151) Further on in his deposition testimony on this subject, however, Complainant stated that he told the Continental interviewer of this proceeding and that he could be called back to work at Yellow Freight at any time, but that they hired him anyway.

⁸ Continental was a unionized employer which, had Complainant completed a probationary period, would have paid him wages and benefits almost equal to those he had been receiving when he was employed by Respondent. (TR 203) One of Respondent's arguments in support of its contention that Complainant failed to mitigate damages is that he avoided seeking employment with unionized companies. In the course of his cross-examination, Complainant testified that Continental Baking was the only union company he worked for. (TR 241)

In September 1989, Complainant worked one day for St. Johnsbury Trucking Company, Inc., as a casual driver earning \$114.55. In October 1989, Complainant sought employment with Cleveland Express, a division of Branch International Service, as a casual driver. After working for approximately 1-1/2 to 2 weeks, Complainant left Cleveland Express. Complainant was concerned as he needed antibiotics for his hidradenitis. Complainant earned \$739.00 for his work. (RX 44)

In the following month, November 1989, Complainant began working for National Transportation Company, a nationwide trucking company based in Omaha, Nebraska.⁹ On November 30, 1989, while in that company's employ, Complainant sustained an injury to his knee and was unable to continue working. The injury occurred at a place called Dry Ridge, Kentucky. According to Complainant's testimony, he was disabled as a result of this injury from November 30, 1989 to March 23, 1990. Complainant earned \$509.38 while working for National Transportation. As a result of this injury, Complainant filed a workers' compensation claim with the Kentucky Workers' Compensation Board. In March 1992, the parties settled the claim for temporary total disability for the lump sum amount of \$14,026.53, out of which Complainant's attorney received \$2,200.00. (TR 359, 365; RX 3, pp. 106-107, 115)

Following his work-related injury with National Transportation in December 1989, Complainant sought employment with Premium Enterprises, Inc., an office supply delivery company, as a dock worker-driver. However, shortly after entering on employment with that company, Premium terminated Complainant on December 19, 1989. (R-RESP 68)¹⁰ At the 1990 damages hearing, Complainant testified that his termination was caused, at least in part, by his medical conditions which were not covered by any medical insurance. At the 1994 damages hearing, Complainant didn't allude to the termination but testified that he left Premium Enterprises to obtain a higher paying job. (TR 204) While working for Premium Enterprises, Inc., Complainant earned a total of \$328.00. (RX 45)

⁹ Although Complainant testified that he worked for National Transportation Company for "about four months" (TR 191), this does not appear to have been the case, considering the relatively small amount of money he earned with that employer.

¹⁰ The notice sent to Complainant by Premium on December 19, 1989, gives as the reason for his termination, "...unsatisfactory work performance and poor attendance during your probationary period."

After leaving Premium Enterprises, Inc., Complainant worked briefly, in late December 1989, for M&K Leasing, earning a total of \$420.00 (R-RESP 44) ¹¹ During 1989, following his discharge from Continental Baking, Complainant also received unemployment compensation in the amount of \$3,852.00 from the Ohio Bureau of Employment Services. (R-RESP 46)

In January 1990, Complainant underwent surgery followed by a brief hospitalization to alleviate his chronic hidradenitis condition (TR 366) Once his period of disability ended in late March 1990 (presumably for the knee injury sustained in November 1989), Complainant sought employment through personal contacts and newspaper advertisements. (TR 449) Although he was unable to remember the precise dates of his employment, Complainant testified that he worked for Transportation Unlimited during 1990 for approximately 25 weeks, earning a total of \$8,929.97. On Complainant's U.S. Individual Income Tax Return for the year 1990, Form 1040A, in evidence as R-RESP 47, the figure entered on Line 7, for wages, salaries, tips, etc., is \$8,930.00. (TR 217, RX 48) Income received for the six days he worked for East Coast Trucking in July 1990 was not reported on his Federal income tax return. (TR 245)

In January 1991, Complainant worked for Superior Fleet Services for approximately two weeks, earning a total of \$1,576.80. (TR 218; R-RESP 36, 51) (However, at TR 236, when he was asked how long he worked for that company, Complainant, referring to Superior Fleet Services, responded: "[a]pproximately four months.) Complainant also worked for Transportation Unlimited in 1991, earning therefrom an additional \$2,922.37. (TR 217; R-RESP 50)

Complainant left Superior and began working for P&M Trucking, Inc. (Complainant consistently referred to this carrier as "PAM" at the October 1994 hearing) in February 1991, earning \$3,512.99. (R-RESP 51) According to Complainant's testimony, he left P&M to seek employment offering a greater salary and more comprehensive benefits. (TR 229-230) However, there is no evidence to suggest that Complainant worked for any other companies in 1991. His 1991 1040EZ, Income Tax Return for single filers with no dependents, reflects total wages, salaries and tips of \$8,012.16, an amount identical to the sum of his earnings reported on W-2's received from Superior, P&M, and Transportation Unlimited.

¹¹ Complainant's employment with M&K Leasing was not considered in Judge Thomas' 1990 opinion on damages. The last earnings included in Judge Thomas' 1990 order were those earned by Complainant at Premium Enterprises.

In January 1992, Complainant applied for Social Security disability benefits. (R-RESP 3, p. 47, R-RESP 31, p. 61) He testified at one point that he got the idea to apply for Social Security Disability Benefits after reading some pamphlets in a doctor's office (TR 92), but later on, that is was after seeing an ad on TV. (TR 351) On direct examination, he testified that his reasons for applying were that he had no hospitalization, he couldn't find a job, his car had broken down and wouldn't run, he was \$100,000.00 in debt and people he owed money to were demanding payment, he was "in kind of bad shape", and he had exposed nerves in his teeth. (TR 90)

On his application for Disability Insurance Benefits (R-RESP 63) dated January 18, 1992, he stated he became unable to work because of his disabling condition on November 2, 1988. (Coincidentally, on November 9, 1988, after Respondent reviewed his overall work record, Complainant was terminated.) On the same form, which he signed, Complainant indicated his agreement to notify SSA if his medical condition improves so that he would be able to work, even though he had not yet returned to work, or if he should go to work whether as an employee or a self-employer person.

Also in January 1992, Complainant filled out a Disability Report in his own handwriting. In this report, Complainant stated that his disabling condition is "Hydradenitis (sic) - Groin - Incurable - Leg - Knee - Ankle - Back - Neck," a condition which first began to bother him, he said, on August 3, 1983. He indicated that hidradenitis is incurable and that he will have to take antibiotics for it for the rest of his life. The problem, he stated, is very painful and causes severe mental problems. (R-RESP 61) Following the evaluations previously referred to by Dr. Mukherjee on June 15, 1992 and Dr. Rees on June 25, 1992, and after considering hospital and treatment records from as far back as December 1979, SSA, on August 14, 1992, determined that Complainant was disabled. Anxiety-related disorder was given as the primary diagnosis, disorders of the male genital organs as the secondary diagnosis. June 25, 1992, the date of Dr. Rees' examination and report, was given as the onset date of disability. (R-RESP 62)

On February 3, 1992, after filing his SSA Disability Insurance Benefits claim, Complainant underwent a second surgery to correct his hidradenitis and was hospitalized until February 4, 1992. (R-RESP 3, p. 108) As a result of the surgery, complainant was unable to work for three weeks. (TR 97)

At the 1994 damages hearing, Complainant testified that his hidradenitis became further aggravated, as he did not have access to his required medication. Complainant explained that his condition is controllable with the proper medication and regular doctor visits. Regular medical treatment is necessary, as

Complainant's dosages and medications frequently change according to his aggravation level at any given time. (TR 96)

After his recovery from the second surgery, Complainant again relocated to Florida. Acting upon the advice of his friend, Robert E. Lee, who assured him that he could arrange an interview with Southern Freightways, Complainant moved to Daytona Beach, Florida. (TR 251) In March 1992, complainant worked as an OTR driver for Southern Freightways. (RX 3, p. 32) An earnings statement from Southern Freightways, accompanying his paycheck dated April 23, 1992, indicates his year-to-date earnings with that company were \$1,932.48. (R-RESP 52) According to his 1992 city and state tax returns (R-RESP 58), his total wages, salary and tips for the year was \$4,147.03, but neither of these returns had a W-2 attached so the source of those earnings in excess of \$1,932.48, the amount indicated on the Southern Freightways earnings statement, are unknown. Possibly some of the unaccounted \$2,214.55 was in additional earnings from Southern Freightways, as R-RESP 52 does not indicate that this was Complainant's final check from that motor carrier. Some of that money undoubtedly was earned from brief periods of employment Complainant testified he had in August or September 1992, after his return from Florida, with Transportation Unlimited and Triton Trucking. (TR 245)

In any event, from September 1992, after being informed that he had been found eligible for SSA benefits, until he was reinstated with Yellow in December 1993, Complainant did not apply for any jobs or work anywhere. (R-RESP 3, p. 130) Complainant gave conflicting reasons for not seeking work during this period. He felt that if he obtained a steady job, his wages could be attached to pay his debts and he wanted to avoid that. (TR 166) He also felt that without at least five years seniority, he would not make much money as an OTR truck driver for another motor carrier although it was pointed out to him that when he had worked for Yellow for only three years (in 1981), he earned over \$25,000.00, and after four years, over \$35,000.00. (TR 167)

In the spring of 1992, when he received his lump sum settlement check for his workers' compensation claim against National Transportation, Complainant quit his job with Southern Freightways, assertedly to return to Cleveland to give his deposition in this case. (TR 64, 262, 292) In June 1992, Complainant returned to Cleveland. (TR 249, 443-444) His deposition was taken that same month in Cleveland. (TR 339) Complainant was questioned at length on cross-examination concerning the validity of this reason for quitting his job with Southern. Respondent attempted to take his deposition in Florida and filed a motion for leave to do so. Complainant denies

knowledge that his attorney opposed the motion or that it was for that reason the deposition ended up being taken in Cleveland. (TR 265)

After receiving and reviewing Complainant's Social Security disability file on June 28, 1994, Respondent arranged for him to undergo a physical and psychiatric evaluation. Based on the results of a medical examination performed on September 28, 1994, Respondent was satisfied as to Complainant's physical and psychiatric competence. Accordingly, Respondent returned Complainant to active work status in early October 1994. (TX 138, Respondent's Brief, p. 61)

CONCLUSIONS OF LAW

Once it is determined that an employer has violated the Surface Transportation Assistance Act, as already found in this case, Complainant, the discriminatee, is entitled to an appropriate award of back pay. *Moravec v. H C & M Transportation, Inc.*, Case No. 90-STA-44 (Sec. Final Dec. and Order, Jan. 6, 1992); *Hufstetler v. Roadway Express, Inc.*, Case No. 85-STA-8 (Sec. Final Dec. and Order, August 21, 1986). Back pay not only reimburses the innocent employee for the actual losses suffered but "furthers the public interest advanced by the deterrence of such illegal acts." *N.L.R.B. v. Madison Courier, Inc.*, 472 F.2d 1307, 1316 (D.C. Cir. 1972).

In computing the appropriate amount of back pay, courts have adopted two basic principles: 1) unrealistic exactitude is not required, and 2) uncertainties in determining the amount of earnings should be resolved against the discriminating employer. *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211 (5th Cir. 1974); *Johnson v. Goodyear Tire and Rubber Company*, 491 F.2d 1364 (5th Cir. 1974).

Back pay is appropriately tolled when the unlawful discrimination is remedied. *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977). Ordinarily, the termination date of back pay liability is upon a bona fide offer of reinstatement. *Ford Motor Company v. EEOC*, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1983); *Figgs v. Quick Fill Corp.*, 766 F.2d 901 (5th Cir. 1985). However in the instant case, the discrimination was not remedied upon the reinstatement of Complainant. Even though Respondent reinstated Complainant on December 17, 1993, Complainant worked for only a few weeks before being transferred to unpaid sick status on January 29, 1994. (R-RESP 6, 7) Additionally, Complainant's medical coverage was terminated on February 28, 1994. Based on Complainant's unpaid

sick status as well as his lack of medical coverage, I find that Respondent's back pay liability was not tolled until Complainant was placed in active work status in October 1994.¹²

According to the relevant case law, back pay includes not only "straight salary" but also all earnings lost by the discriminatee, including interest, overtime, shift differentials, and any fringe benefits such as vacation and sick pay to which the employee would have been entitled had it not been for the illegal discriminatory act of the employer. Pettway, supra, 494 F.2d at 263. Accordingly, Complainant is entitled to full payment for vacation, sick pay, holidays, and birthdays pursuant to the collective bargaining agreement covering Complainant's employment. According to Complainant's seniority as well as the terms of the National Master Freight Agreement by which Complainant and Respondent are bound, Complainant is entitled to approximately three weeks of paid vacation, five days of paid sick leave, five days of holidays, and one day for his birthday for each year since his date of discharge. (CX 1, 2; TR 9) Therefore, for the period from March 1990 to October 1994, Complainant is entitled to an additional 26 days of back pay.

Pursuant to the pertinent case law, an appropriate method of computing back pay is to use the earnings of similarly-situated employees. Pettway, 494 F.2d at 262; Reed v. National Minerals Corp., Case No. 91-STA-34 (Sec. Final Dec. and Order, July 24, 1992). In this case, the parties have already stipulated to the comparable earnings of three individuals with similar job titles and seniority dates to those of Complainant. (Revised JX 1)¹³

According to the parties' stipulation as to earnings, Complainant would have earned a total gross back pay of \$233,545.00 had he continued to be employed from March 1990 through September 16, 1994. See, N.L.R.B. v. Pilot Freight Carriers, Inc., 604 F.2d 375, 377. (Revised JX 1)¹⁴ However,

¹² This finding is based upon Respondent's assertion in its brief that it returned Complainant to active work status shortly after the October 3, 1994 hearing. (Respondent's brief p. 61)

¹³ Pursuant to an agreement made at the October 4, 1994 hearing, Complainant and Respondent stipulated post hearing to a modified earnings chart reflecting average monthly earnings. Said chart was admitted post hearing as Revised Joint Exhibit 1.

¹⁴ The parties only stipulated to earnings through September 16, 1994. (Revised JX 1) However, according to Respondent's brief, Complainant did not resume his active work status until early October 1994. Therefore, Complainant's gross back pay would be further increased to reflect earnings through the date on which Respondent returned Complainant to (continued)

Complainant has partially mitigated his damages by wages earned through interim employment. Since 1990, Complainant has earned \$24,941.00. Such interim wages must be deducted from Complainant's gross pay of \$236,116.00 to obtain a net back pay of \$221,176.00. *N.L.R.B. v. Gullett Gin Co.*, 340 U.S. 361 (1951).¹⁵

However, Respondent alleges that in addition to the offset for interim earnings, Complainant's back pay should be further reduced in light of Complainant's failure to appropriately mitigate his damages through alternative employment. Respondent argues that discharged workers such as Complainant are required to diligently seek and sustain comparable employment so as to mitigate their damages. *Ford Motor Company*, 458 U.S. 219, 231-233; *Sennello v. Reserve Lift Insurance Co.*, 667 F.Supp. 1498 (S.D. Fla. 1987).

Based on the evidence of the record, I find that Complainant appropriately mitigated his damages. Since Judge Thomas' 1990 Order, Complainant actively pursued employment both through personal contacts and by responding to newspaper advertisements. Since March 1990, Complainant has worked for a total of seven trucking companies in both Florida and Ohio in positions substantially equivalent to his former position with Respondent. Based on the evidence as a whole, I find that Complainant has exercised reasonable diligence in seeking alternative employment, thus successfully mitigating his damages. *N.L.R.B. v. Arduini Manufacturing Corporation*, 394 F.2d 420, 423 (1st Cir. 1968); *N.L.R.B. v. Laborers' Int. Union of North America*, 748 F.2d 1001, 1005 (5th Cir. 1984).

As for Respondent's assertion that Complainant did not adequately sustain his employment with these companies, I find the reasons for Complainant's departure from these jobs to be reasonable and justified in light of Complainant's chronic medical problems, disruptions that occurred in his personal life, and his ongoing involvement in the present litigation.

(Footnote 14 continued) active work status. Based on an average monthly earning of \$4,285.00, Complainant's gross back pay should include an additional \$2,571.00 to reflect approximate earnings through October 4, 1994 ($(\$4,285.00 \div 30) \times 18$ days). Accordingly, with this explanation, Complainant's gross back pay amounts to \$236,116.00.

¹⁵ All interim earnings prior to Complainant's work with M&K Leasing in late December 1989 have already been included in Judge Thomas' Order on damages.

Respondent further argues that Complainant failed to mitigate damages after September 19, 1992, upon notification by the Social Security Administration that he was entitled to disability benefits. Contrary to Respondent's assertions, I do not find it unreasonable that Complainant did not seek employment after September 1992 after he had been found to be disabled and incapacitated due to mental problems and his chronic hidradenitis. To find otherwise, would be the equivalent of crediting Respondent's counsel's pronouncement that Complainant is a "con artist [who] hatched a plan to defraud the Social Security Administration" (Respondent's Post-Hearing Brief, p. 52), over the documented findings of the Social Security Administration, based on the opinions of two physicians, one of whom is a psychiatrist, that Complainant was totally disabled as of the date of Dr. Rees' examination and report, June 25, 1992. I find no justification for doing so.

Furthermore, except to the extent hereinafter discussed, Complainant's back pay should not be reduced by the amount of money Complainant received in Social Security Disability Benefits. According to the collateral source rule, benefits received from other sources do not diminish Respondent's liability for the damages resulting from its illegal act. *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 83 (3d Cir. 1983). Benefits received from unemployment compensation, Social Security, and welfare programs are appropriately considered collateral benefits and are not deducted from the amount of the back pay award. *Craig*, 721 F.2d at 83. Nevertheless, because, contrary to his obligation agreed to when he applied for Social Security Disability Benefits (R-RESP 63), Complainant failed to inform SSA that he had been reinstated in his job with Respondent and had begun work on December 20, 1993, some reduction from his back pay award for SSA benefits received in the period thereafter, is appropriate.

Accordingly, Complainant's back pay award is not to be reduced for the Social Security Disability Benefits received by Complainant from January 1993 through December 20, 1993. To deduct these payments from the back pay award would deprive Complainant of an advantage and confer it on a wrongdoing party, in this case, the Respondent. *Craig*, 721 F.2d 83. *Smith v. United States*, 587 F.2d 1013, 1015 (1978). *Johnstown v. Harris County Flood Control Department*, 869 F.2d 1565 (5th Cir. 1989). However, a reduction in damages of \$9,000.00 for SSA Disability Benefits received in 1994 will be made from the final award.

With regard to Complainant's medical expenses incurred since March 1990, my Order provides for Respondent to reimburse Complainant for all incurred medical expenses from March 1990 through October 1994. Although Respondent briefly reinstated Complainant's medical benefits in December 1993, they were again terminated once Respondent learned that Complainant was receiving

Social Security Disability Benefits in January 1994. Pursuant to a letter dated May 10, 1994, Respondent last contributed to Complainant's health plan on February 28, 1994. (R-RESP 128) Accordingly, Respondent should reimburse Complainant for all medical expenses from March 1990 until such time as Respondent can provide documentation that it has activated Complainant's medical coverage.

As for the two surgeries performed in January 1990 and February 1992 and paid for by Welfare for Complainant's hidradenitis, I find that Respondent is responsible for their cost as the agency providing the welfare benefits will look to Complainant for reimbursement for the amount it paid for the medical services, when Complainant is financially able to repay.

Additionally, Respondent shall pay Complainant's attorney fees and other reasonably incurred costs. The Court has received itemized attorney's fees from Lincoln R. Thorman, Esq. as well as from the law firm of Chattman, Sutula, et al. (CX 3, 4) In his request for attorney's fees, Attorney Thorman seeks a total of \$300.00, representing 2.00 hours of attorney time at \$150.00 per hour. (R-COMP 3) In its attorney's fee request, Chattman, Sutula, et al. seeks a total of \$46,865.00, representing 6.50 hours by Aaron J. Reber at \$50.00 per hour; 1.00 hour by Bonnie G. Kraus at \$100.00 per hour; 62.50 hours by Gerald B. Chattman at \$150.00 per hour; 1.00 hour by a law clerk at \$50.00 per hour; 248.50 hours by Richard G. Ross at \$150.00 per hour; .50 hour by Sanjay K. Varma at \$125.00 per hour; 2.00 hours by Susan St. Onge at \$75.00 per hour; and 1.50 hours by Terri A. Beer at \$50.00 per hour. (R-COMP 3)

Respondent objects to Complainant's attorney's fees, claiming they are excessive and duplicative. Respondent contends that the fees are duplication in that Attorney Thorman's fees cover the same time period as those claimed by Chattman, Sutula, et al. Disagreeing with Respondent, I do not find these fees duplicative or excessive in light of the complexity and procedural history of this case. Furthermore, I find it justifiable and even prudent that Complainant consulted more than one attorney regarding the matters of this case. In consideration of the quality of the representation, the nature of the issues involved, and the amount of money at stake, I find the total requested attorney's fees of \$47,165.00 to be appropriate.

With regard to all damages incurred prior to March 1990, I am persuaded to Judge Thomas' reasoning and rationale contained in his Decision and Order on Damages issued June 18, 1990. Accordingly, I adopt Judge Thomas' 1990 Order in its entirety with the exception of Judge Thomas' finding regarding medical expenses. Secretary Dole modified Judge Thomas' Order by requiring Respondent to reimburse Complainant only for his incurred medical expenses since his date of discharge and to pay

sufficient monies into Complainant's health and welfare fund to enable Complainant to receive immediate coverage upon reinstatement. As it is unclear from the record whether Respondent has fully complied with Judge Thomas' 1990 Order, I hereby order Respondent to comply with it now, specifically to pay or to provide to Complainant: 1) back pay of \$42,710.04 (which reflects a deduction for Complainant's interim earnings of \$5,769.02); 2) interest of \$3,502.54; 3) medical expenses of \$6,584.02; 4) litigation costs of \$1,095.36; and 5) costs of seeking alternative employment of \$15.54.

RECOMMENDED ORDER

Respondent, Yellow Freight Systems, Inc., is hereby ORDERED to pay or provide to Complainant, Thomas E. Moyer, the following:

1. Back pay in the amount of \$202,175.00;
2. Interest on the back pay award to be calculated pursuant to 26 U.S.C. §6621 (1988) (rate for underpayment of Federal income tax);
3. All reasonable medical expenses incurred by Complainant from March 1990 through October 1994; and
4. Attorney's fees in the amount of \$47.165.00

GEORGE P. MORIN
Administrative Law Judge

GPM/rlh/lab